SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 621

THE FIRST NATIONAL BANK & TRUST COMPANY OF BRIDGEPORT, CONNECTICUT, TRUSTEE,

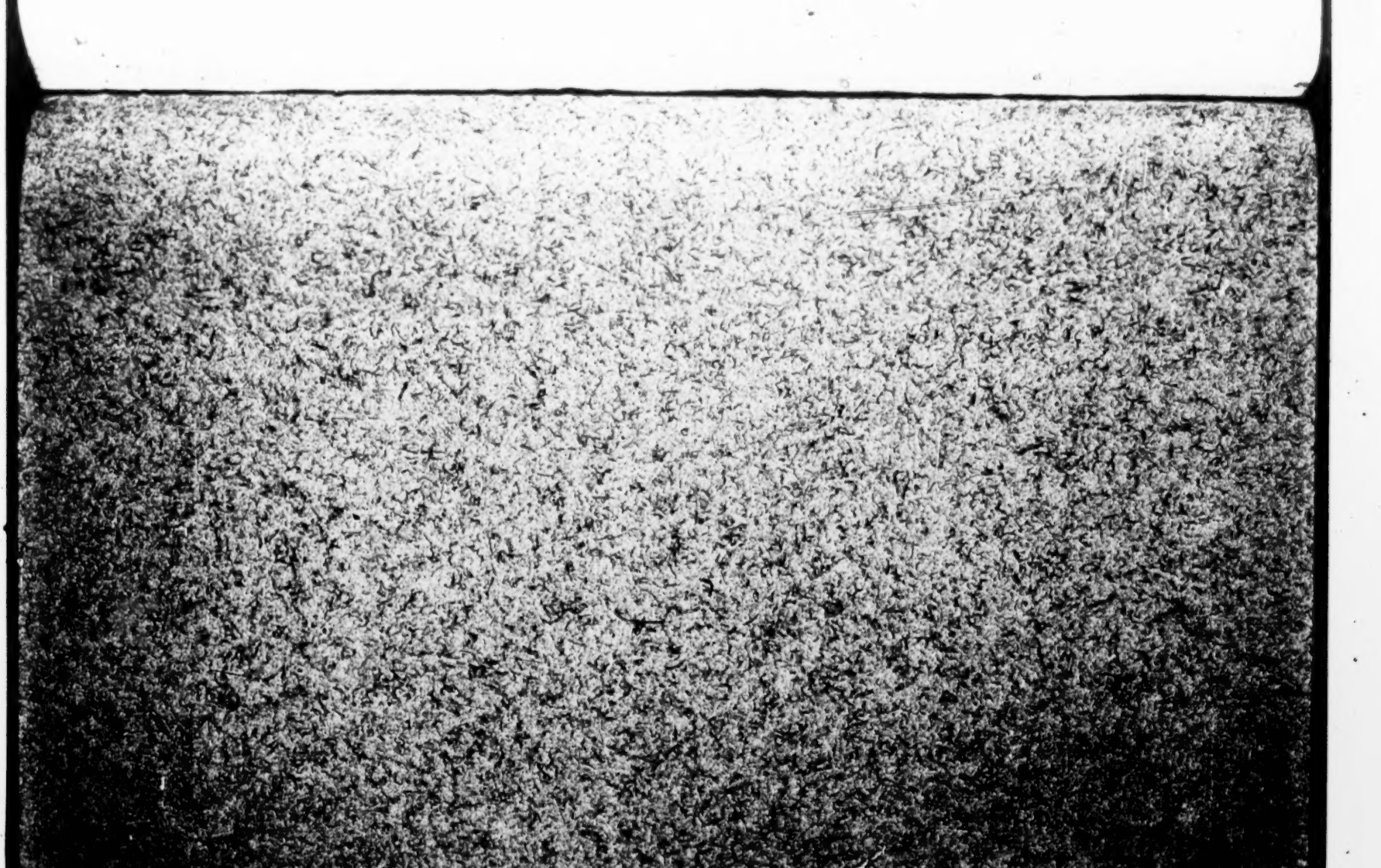
Petitioner,

vs.

FRANCIS E. BEACH.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ARTHUR B. WEISS,
Attorney for Petitioner,
First National Bank & Trust Co.
of Bridgeport, Conn., Trustee.



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FRANCIS E. BEACH.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of The First National Bank and Trust Company of Bridgeport, Connecticut, Trustee, respectfully shows to this Honorable Court:

Summary Statement of Facts and Matters Involved.

The petitioner is the owner of a mortgage on certain real estate belonging to the respondent. Foreclosure was brought on the mortgage, returnable before the Superior Court for Fairfield County in the State of Connecticut on the first Tuesday of June, 1931, and judgment was entered

in that suit setting the day for redemption by the respondent as the third Monday of November, 1935 (R. 7).

On November 14, 1935, the respondent filed a petition in the United States District Court for the District of Connecticut in which he alleged that he was "*bona fide* engaged primarily in producing products of the soil", and in which he sought the benefits of the provisions of Section 75 of the Bankruptcy Act as amended, 11 U. S. C. A. 203, c. 114, Sec. 3, 49 Stat. 246. On that date, the petition was approved and referred to a conciliation commissioner (R. 2).

On November 15, 1935, the Superior Court, on being informed of the filing of the petition in the District Court ordered the judgment of foreclosure to be reopened and to remain open subject to the determination of these proceedings (R. 7).

Your petitioner (First National Bank and Trust Company of Bridgeport, Connecticut, Trustee), thereupon moved in the District Court for an order to show cause why the order approving the respondent's petition should not be vacated and the respondent's petition dismissed on the ground that the respondent was not a farmer within the definition set forth in Subsection (r) of said Section 75 of the Bankruptcy Act (R. 3).

The sub Section of the statute just cited and here involved reads as follows:

"Farmer Defined.

"For the purpose of this section, section 22b and section 202, the term 'farmer' includes not only an individual who is primarily personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations, and includes the personal representative of a deceased farmer; and a farmer shall

be deemed a resident of any county in which such operations occur."

[The section above quoted, enacted May 15, 1935, is now in effect and was in effect during the entire course of these proceedings. The wording of the same section prior to the amendment of May 15, 1935, is set forth in the appendix. Some of the cases cited in the brief were decided when the earlier section was in effect, but a comparison of the wording will show that the amendment did not affect the question here involved or the pertinence of the cases cited. (Section 22b, otherwise known as Section 4(b) of the Bankruptcy Act is also set forth in the appendix.)]

After taking evidence, the Judge of the United States District Court, by his order dated December 2, 1935, dismissed the respondent's petition (R. 12-13).

The Circuit Court of Appeals granted leave to appeal (R. 15), and later by a divided court, reversed the District Court (R. 15-18).

The stipulated facts (R. 4, 5 and 6) show that prior to 1930 the respondent was a merchant and for the five years immediately prior to the filing of the petition, his average total income was $4,000.00 per year, divided as follows: $200.00 received from poultry and eggs, $75.00 from hay, $25.00 from vegetables and flowers, $1,500.00 from rentals of real estate not claimed to be farm property, and $2,200.00 from the rental of the claimed farm property.

Both the District Court (R. 12) and the Circuit Court of Appeals (R. 16) found that the respondent was not primarily engaged in producing products of the soil or in farming.

The District Court held that the sum of $2,200.00 received as rent from the farm property was income to the respondent "in his capacity as a landlord rather than as one who is '*bona fide* personally engaged in producing products of the soil, etc.' " (R. 12).

The Circuit Court of Appeals (Circuit Judges Manton, L. Hand and Swan, Judge Hand writing, Judge Swan dissenting) held that the principal part of the income of the respondent, being rent from a farm, constituted the respondent a farmer within the provisions of Subsection (r) of Section 75 of the Bankruptcy Act.

QUESTION PRESENTED.

THE SOLE QUESTION OF LAW INVOLVED HEREIN IS WHETHER AN INDIVIDUAL WHO RECEIVES THE PRINCIPAL PART OF HIS INCOME FROM THE RENT OF A FARM IS A FARMER WITHIN THE PROVISIONS OF SUBSECTION (R) OF SECTION 75 OF THE BANKRUPTCY ACT.

Reasons Relied on for the Allowance of the Writ.

I. The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court.

II. The decision of the Circuit Court, by a divided court, reverses the District Court.

III. The decision of the Circuit Court is contrary to the weight of authority.

It is in conflict with at least two District Court decisions in other circuits, both of which are well reasoned and rely on earlier decisions construing the expression "farmer" as used in another section of the Bankruptcy Act.

IV. The decision of the Circuit Court appears to be in conflict with a later decision of the same court in re George B. Sherwood, appellee, v. Thomas J. Kitcher, — F. (2d) —, not yet reported, which is set forth in full in the appendix.

WHEREFORE YOUR PETITIONER PRAYS the allowance of a writ of certiorari to the United States Circuit Court of Ap-

peals for the Second Circuit in this cause there entitled, "In Re Francis E. Beach, Debtor—The First National Bank and Trust Company of Bridgeport, Connecticut, Appellee *v.* Francis E. Beach, Appellant, October Term, 1936, No. 26," that said cause may be reviewed and determined by this Court and that the judgment of the said Circuit Court of Appeals may be reversed and for such other and further relief as to this Honorable Court may seem proper.

Dated at Bridgeport, Connecticut, December 24, 1936.

THE FIRST NATIONAL BANK & TRUST COMPANY
OF BRIDGEPORT, CONNECTICUT, TRUSTEE,
Petitioner,

By ARTHUR B. WEISS,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 621

THE FIRST NATIONAL BANK & TRUST COMPANY OF BRIDGEPORT, CONNECTICUT, TRUSTEE,
Petitioner,

vs.

FRANCIS E. BEACH.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions Below.

The opinion by the United States District Court for the District of Connecticut was written by Judge Carroll C. Hincks. It was filed December 2, 1935, has not been reported and appears on pages 12 and 13 of the record.

The opinion of the Circuit Court of Appeals (Circuit Judges Manton, L. Hand and Swan, Judge Hand writing, Judge Swan dissenting), which opinion reverses the order of the District Court, was filed November 16, 1936 and appears on pages 15, 16, 17 and 18 of the record. It is reported in 86 F. (2d) 88.

Jurisdiction.

The jurisdiction of this Court to issue the writ of certiorari applied for is predicated upon Section 240(a) of the

Judicial Code as amended by the Act of Feburary 13, 1925. (c. 229, Sec. 1, 43 Stat. 938.) (28 U. S. C. A., Sec. 347.).

The judgment and the decree sought to be reviewed was issued by the United States Circuit Court of Appeals for the Second Circuit on the 16th day of November, 1936 (R. 18).

The within petition for review was docketed with the clerk of this Court within three months after the entry of the order of reversal by the Circuit Court of Appeals.

Statement of the Case.

The agreed facts are set forth concisely on pages 4, 5 and 6 of the record and in the foregoing petition.

Specification of Errors.

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court in holding that an individual who receives the principal part of his income from the rent of a farm is a farmer within the terms of Subsection (r) of Section 75 of the Bankruptcy Act.

2. The Circuit Court of Appeals erred in holding that the respondent received the principal part of his income from the rent of a farm.

ARGUMENT.

I.

The Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

Since it is obvious that this case involves the interpretation of a Federal statute, not heretofore passed on by this Court, the only question is whether it is of sufficient

importance for this Court to exercise its discretion in favor of granting the writ.

This Court is aware of the large number of cases pending in the lower Federal Courts, involving Subsection (r) of Section 75 of the Bankruptcy Act here in question. The question of interpretation of this section has arisen in the following cases:

In re Hilliker, 9 F. Supp. 948 (D. C., S. D. Cal. C. D.);
In re Day, 10 F. Supp. 229 (D. C., E. D. Ill.);
In re Storey, 9 F. Supp. 858 (D. C., S. D. Cal., C. D.);
In re Wilkinson, 10 F. Supp. 100 (D. C., E. D. N. Y.);
In re Weis, 10 F. Supp. 227 (D. C., S. D. Iowa);
In re George B. Sherwood, Appellee against *Thomas J. Kitcher, Appellant*, C. C. A. (2), not yet reported (opinion set forth in appendix).

See

In re McMurray, 8 F. Supp. 449 (D. C., S. D. Iowa);
In re Knight, 9 F. Supp. 502 (D. C., D. Conn.);
In re Peterson, 8 F. Supp. 86 (D. C., W. D. Mich., S. D.);
In re Fullagar, 8 F. Supp. 602 (D. C., W. D. N. Y.);
In re Plumer, 9 F. Supp. 923 (D. C., S. D. Cal., S. D.).

Where such a situation exists, to wit:

(a) a novel question of current importance;

(b) numerous cases pending in the lower Courts in which the question is involved,

(c) a confused state of authorities, and

(d) the question is one of interpretation of the Bankruptcy Act,

this Court, in the interest of law and in order to avoid the necessity for numerous appeals, has granted certiorari.

Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, Sec. 320, page 650;

Meyer v. *Kenmore Granville Hotel Co.*, 297 U. S. 160, 56 S. Ct. 405;

Callaghan v. *Reconstruction Finance Corp.*, 297 U. S. 464, 56 S. Ct. 519.

See also:

Robertson & Kirkham, op. cit. Sec. 295, page 577-579;

Local Loan Co. v. *Hunt*, 292 U. S. 234;

Continental Bank v. *Rock Island Railway Co.*, 294 U. S. 648, 55 S. Ct. 595;

Louisville Bank v. *Radford*, 295 U. S. 555, 55 S. Ct. 854;

Fidelity and Deposit Co. v. *Arenz*, 290 U. S. 66;

Daniel v. *Guaranty Trust Co.*, 285 U. S. 154.

This case ought to appeal particularly to this Court as one meriting its review since the Circuit Court, in its opinion (R. 17) admits that its decision is made "notwithstanding the violence done to ordinary usage" and notwithstanding that "it is certainly a great abuse of words to call that man a farmer who merely lives upon the yield of farm lands".

II.

The decision of the Circuit Court, by a divided court, reverses the District Court.

Although it is conceded that the mere fact that the Circuit Court, by a divided decision, reversed the decision, would not of itself warrant the granting of the writ, nevertheless it is urged that this fact should be given consideration together with the other reasons urged herein.

Robertson and Kirkham, op. cit., Sec. 306, page 618.

III.

The decision of the Circuit Court is contrary to the weight of authority.

It is in conflict with at least two District Court decisions in other circuits, both of which are well reasoned and rely on earlier decisions construing the expression "farmer" as used in another section of the Bankruptcy Act.

The Circuit Court admits (R. 17) that its decision is in conflict with the following decision:

In re Hilliker, 9 F. Supp. 948 (D. C. S. D. Cal. C. D.).

In that case Judge James said:

> "As I read the definition, in the light of the apparent intent of Congress, it is that the individual in all cases must be engaged 'primarily' in farming operations; and that the additional clause 'or the principal part of whose income is derived from farming operations' was inserted as a precaution against a bona fide farmer being otherwise classed, where for instance, during bad years and where the farmer's returns are less than the cost of operation and the farmer is obliged temporarily to engage in some other occupation to earn a livelihood, he is not to be deprived of his true character and so denied the benefit of the act."

The Court there further said:

> "It is regrettable that we have no decisions up to this date by the Supreme Court of the United States or the Circuit Courts of Appeals to furnish a rule by which the trial courts may be guided. The case in hand is one suited for use in obtaining an interpretation by the Court of Appeals. I am hopeful that counsel for petitioner will take the matter there."

And again, *In re Day*, 10 F. Supp. 229 (D. C. E. D. Ill.), the Court said:

> "The Court is of the opinion that there is little distinction between the phrase 'engaged chiefly in farming' and that of 'personally • • • engaged primarily in farming' or that of 'the principal part of whose income is derived from farming operations' • • •
>
> "Consequently the reasoning of the Courts interpreting the language used in the original act is persuasive." (Section 4(b) National Bankruptcy Act.)

The Court there then cited

In re Brown (D. C.), 284 Fed. 899;
In re Matson (D. C.), 123 Fed. 743;
In re Glass, 53 F. (2d) 844.

All of these cases hold that one who derives his income from the rent of a farm is not thereby constituted a farmer. These cases were cited by the Circuit Court in its opinion in the instant case with approval (R. 17). The Court then went on to say:

> "Again it was also settled that a person who lived on income derived from a farm was not a farmer."

Nevertheless it refused to follow the reasoning of those cases.

It is therefore apparent that the decisions involving the section of the Bankruptcy Act here in question are inconsistent in theory and are in such confusion as to leave doubt as to the true intent and meaning of the statute. Where there is a conflict in the decisions of various District Courts concerning a currently important question involving interpretation of the Bankruptcy Act and where a Court below has called attention to the confused state of the authorities

as *In re Hilliger* (cited above), this Court has in the interest of clarity and uniformity granted certiorari.

Robertson and Kirkham, op. cit., Sec. 295, page 579;

Royal Indemnity Co. v. *American Bond and Mortgage Co.*, 289 U. S. 165, 53 S. Ct. 551;

D. Ginsberg & Sons v. *Popkin*, 285 U. S. 204, 52 S. Ct. 322;

Robertson and Kirkham, op. cit., Sec. 320, pages 647-648;

Conrad, Rubin & Lesser v. *Pender*, 289 U. S. 472, 53 S. Ct. 703;

Buffum v. *Barceloux Co.*, 289 U. S. 227.

It is reasonable to assume that the reason that there is no present conflict between Circuit Courts of Appeals is that the statute involved has been only recently enacted.

IV.

The decision of the Circuit Court appears to be in conflict with a later decision of the same court in re George B. Sherwood, appellee, v. Thomas J. Kitcher, — F. (2d) —, not yet reported, which is set forth in full in the appendix.

In *Sherwood, Appellee*, v. *Kitcher, Appellant* (opinion set forth in appendix), the Circuit Court which decided the principal case said:

> "On the other hand, if we look to the second clause of section 75(r) and interpret it, as we did in In re Beach, still the petition should be dismissed, because the greater part of Kitcher's income did not come from farming operations. In this aspect of the case he asks us to count the gross return from his farm and not the net. This would falsify the statute; * * * it would be a meaningless test to compare the gross return from the farming with those from another business"

In the instant case it is obvious that the same Court did measure the total return of the farm, to wit: $2,200.00 as against income from other sources. It gave no consideration to the fact that the farm was subject to taxes and to a mortgage of $100,000.00 on which interest had to be paid so that in fact there was no net income from the rent. No inquiry was made in the District Court as to whether any part of the $2,200.00 received as rent was net income since the Court there indicated that rent, whether gross or net, could not be considered as income derived from farming.

For the foregoing reasons it is respectfully submitted that the writ of certiorari should be granted.

THE FIRST NATIONAL BANK & TRUST COMPANY
OF BRIDGEPORT, CONNECTICUT, TRUSTEE,
By ARTHUR B. WEISS,
Its Attorney.

APPENDIX.

A.

Section 4(b) of the National Bankruptcy Act, Title 11 U. S. C. A. 22(b) as amended June 25, 1910, c. 412, sections 3 and 4, reads as follows:

> "Any natural person, except a wage earner or a farmer, any unincorporated company, and any monied business or commercial corporation (except a municipal railroad, insurance or banking corporation or a building and loan association) owing debts to the amount of $100,000 or over, may be adjudicated an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefit of this Act."

B.

Section 75(r), 11 U. S. C. A., section 203(r), c. 204, section 1, 47 Stat. 1470, as originally enacted March 3, 1933, read as follows:

> "For the purpose of this section, the term 'farmer' means any individual who is personally bona fide engaged primarily in farming operations or the principal part of whose income is derived from farming operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such farming operations occur."

C.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

GEORGE B. SHERWOOD, *Appellee,*

against

THOMAS J. KITCHER, *Appellant.*

Before L. Hand, Swan and Chase, Circuit Judges.

Appeal from an order of the District Court for the District of Connecticut dismissing a proceeding under Section 75 of the Bankruptcy Act.

Sydney P. Simons for the appellants.
John V. Donnelly for the appellee.

L. HAND, *Circuit Judge*:

This is an appeal by Kitcher, the debtor, from an order in bankruptcy, dismissing his petition under Section 75 of the Bankruptcy Act on motion of a mortgagee. The only question is whether the petitioner was a "Farmer", within the meaning of subdivision r. Kitcher lived upon a farm of one hundred and seventeen acres which he owned, twenty-five acres of which he worked, and from which he had at least partially supported himself until the depression. When farm products fell so low that he could no longer make a living, he took a steady job as a moulder, a trade which he had learned in his youth, and at which he had indeed worked off and on all his life. At the time he filed his petition he had been so employed for six years, working five days a week for over nine hours a day, counting his goings and comings. He also still worked on his farm, mornings, evenings, Saturdays and Sundays; but this could scarcely have amounted to more than thirty- or thirty-five hours a week even in summer. For the years 1933, 1934 and 1935, his aggregate earnings as a moulder had been $4738.96, and from the farm, nothing but such produce as

he consumed; his net returns from it in cash were nil, though his gross was $4920. The judge dismissed the petition and Kitcher appealed with our leave.

We have just decided (In re Beach, 86 F. (2) —), following earlier decisions under Section 4 (b), that a man who gives all his working hours to two or three acres of land from which he does not and cannot make a living, is not a farmer; but that if such a one receives the greater part of his income from the rent of farm lands, he is within the second clause of Section 75(r). The district judge here assumed that Kitcher would have been "primarily bona fide personally engaged" in farming, if his earnings from farming had been greater than what he earned elsewhere; but, as they had not been, he dismissed the petition. We do not wish to be understood as accepting that test; we need not say that one who gives all his time to unsuccessful farming on a large enough scale to count, is not a farmer because he has an outside income on which he lives. In the case at bar, judged either by the hours spent or by his returns, Kitcher was not a farmer; and if there be any other test, as perhaps there may be, none has been suggested to us.

On the other hand, if we look to the second clause of Section 75 (r) and interpret it, as we did in In Re Beach, *supra,* still the petition should be dismissed, because the greater part of Kitcher's income did not come from farming operations. In this aspect of the case he asks us to count the gross return from his farm and not the net. That would falsify the statute; the seed, the manure, the tools, the draught animals, the wagons, the planters and reapers; all these and more must be paid for out of the gross return before any "income" results. It would be a meaningless test to compare the gross returns from the farming with those from another business; the result would have no relation either to the demands of the farm upon the debtor's time, or to his dependence upon it, the relevant factors. True, the statute was primarily designed to relieve unsuccessful farmers, and we have assumed arguendo that one whose principal work is bona fide farming is within it, win

or lose; but if he gives the greater part of his working hours to something else, it cannot matter that the gross returns from some incidental farming exceed the net or gross of his other income. Nor can we count it that in the past Kitcher actually supported himself from his farm and was forced to become a moulder by the fall in farm products. When he escaped from the class which the statute meant to succor, he escaped; the occasion for his shift did not continue the privileges of those who were not so fortunate.

Order affirmed.

(8534-C)